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Supreme Court, U.S.
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No. 96-1986

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

SAMUEL L. NARO AND LINDA NARO, HUSBAND AND WIFE,

Petitioners,

v.

HAMILTON TOWNSHIP, HAMILTON TOWNSHIP POLICE DEPARTMENT, DETECTIVE CAPTAIN THOMAS PIZZULLO, JOHN DOE I, JOHN DOE II, JOHN DOE III, JOHN DOE IV, JOHN DOE V, JOHN DOE VI, JOHN DOE VII, JOHN DOE VIII, JOHN DOE IX, JOHN DOE X (fictitious names meant to represent other police officers involved in the investigation), THE TRENTON TIMES, THE NEWHOUSE PUBLISHING COMPANY, PETER PAGE, RICHARD BILOTTI, THE TRENTONIAN, JOURNAL REGISTER COMPANY, MARK A. WALIGORE, PAUL MICKLE, H.L. SCHWARTZ, III, RON ROE I, RON ROE II, RON ROE III, RON ROE IV, RON ROE V, RON ROE VI, RON ROE VII, RON ROE VIII, RON ROE IX AND RON ROE X,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

REPLY BRIEF

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July 25, 1997

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Respondents representing the Times, Peter Page and Richard Bilotti (hereinafter, the Times respondents) assert that this Court is without jurisdiction to grant the petition because there was adequate and independent state grounds for the state court decision (Rb7).[1] In this respect, they refer to the Appellate Division's ruling regarding fair report privilege. Petitioners maintain that the Appellant Division ruling was so intertwined with the instant federal constitutional issue as not to comprise a truly independent state law ground.

In its ruling regarding the fair report privilege, the Appellate Division relied on *Costello v. Ocean County Observer*, 136 N.J. 594 (1994). That opinion, however, was based on a combined ruling regarding the state fair report privilege, as well as the traditional federal First Amendment analysis as to public figures. *State v. Costello*, *supra* at 611-612. The state and federal rulings were so interwoven as not to be independently separable. Under the circumstances, the state court's ruling did not comprise an independent state ground of the type that would preclude this Court's review. *See St. Martin Lutheran Church v. South Dakota*, 451 U.S. 772, 780 n.9 (1981); *Abie State Bank v. Bryan,* 282 U.S. 765, 773 (1931).

The Times respondents also contend that the limited purpose public figure issue was not raised by petitioners in the state court. (Rb13). Petitioners sharply dispute this contention. As reflected by the briefs filed by petitioners and by the Times respondents before the New Jersey Appellate Division, this issue was clearly raised by both parties. Therefore, petitioners are not barred from raising it before this Court.

Specifically, in their Appellate Division brief, petitioners argued that petitioner, Samuel Naro was involuntarily thrust

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[1] "Rb" refers to the brief by the Times respondents that was filed in opposition to petitioners' petition for writ of certiorari brief.

into the public limelight as a result of his arrest for assault, which preceded the newspaper articles at issue. (RA-20). In this respect, petitioners stated as follows:

> Mr. Naro, without his consent, was thrust onto the front pages of the Defendant newspapers as a result of his arrest, although he was subsequently acquitted. This attempt by the Defendant newspapers to create a public figure in Mr. Naro was the impetus for the alleged justification of Defendants to publish the libelous articles which form the basis of this Complaint.

(RA-20).

In their response brief to petitioners' Appellate Division brief, the Times respondents extensively discussed the jurisprudence applicable to limited purpose public figures. (RA-10 to RA-12). In this respect, the Times respondents cited some of the identical cases which they now cite before this Court.[2] They specifically argued that petitioner was a limited purpose public figure as follows:

> As in *Marcone* and *Ruebke*, Naro's robbery arrest was widely reported prior to his being implicated in the investigation of the Szeker murder. As such, he qualifies as a limited purpose public figure.

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[2] Specifically, the Times respondents cited the following opinions regarding this area: *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Marcone v. Penthouse International Magazine for Men*, 754 F. 2d 1072 (3rd Cir.), *cert. denied*, 474 U.S. 864 (1985); *Ruebke v. Globe Communications Corp.*, 241 Kan. 595, 738 P.2d 1246 (1987). (RA-10 to RA-11).

> Contrary to his assertion, Naro was not thrust into the Szeker limelight through no fault of his own. (Pb2). Naro placed himself into the Szeker limelight by committing a criminal act with a modus operandi apparently similar to that used to murder Marjorie Szeker. If Naro had not donned a disguise and brutally beaten Andrew Horchak while attempting to rob him, Naro would not have attracted the suspicion of the Hamilton Township Police Department. Thus, he cannot be heard to complain that he involuntarily became a limited-purpose public figure.

(RA-11 to RA-12).

Petitioners in their reply brief explicitly argued that petitioner, Samuel Naro, was not a public figure. (RA-4). Petitioners' reply brief stated the following:

> The Plaintiff, Sam Naro, was not a public figure, but a private citizen, who received more front page news coverage with a false story than most public figures receive for factual stories. The fact that Sam Naro is a firefighter does not place him in the realm of a "public figure".

(RA- 4).

Under the circumstances, for the Times respondents to now state that the issue of a limited purpose public figure was not raised before in the state courts is a gross misstatement. This issue was clearly raised both offensively and defensively in the state courts and cannot be construed as procedurally barred.

Respectfully submitted,

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Appendix

APPENDIX A

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Docket No. A-6485-94T2
CIVIL ACTION

SAMUEL NARO and LINDA NARO, husband and wife,
Plaintiffs/Appellants,

vs.

HAMILTON TOWNSHIP, HAMILTON TOWNSHIP POLICE DEPARTMENT, DETECTIVE CAPTAIN THOMAS PIZZULLO, JOHN DOE I, JOHN DOE II, JOHN DOE III, JOHN DOE IV, JOHN DOE V, JOHN DOE VI, JOHN DOE VII, JOHN DOE VIII, JOHN DOE IX, JOHN DOE X, (fictitious names meant to represent other police officers involved in the investigation); THE TRENTON TIMES, THE NEWHOUSE PUBLISHING COMPANY, PETER PAGE, RICHARD BILOTTI, THE TRENTONIAN, JOURNAL REGISTER COMPANY, MARK A. WALIGORE, PAUL MICKLE, H.L. SCHWARTZ, III, RON ROE I, RON ROE II, RON ROE III, RON ROE IV, RON ROE V, RON ROE VI, RON ROE VII, RON ROE VIII, RON ROE IX, RON ROE X,
Defendants/Respondents

ON APPEAL FROM SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MERCER COUNTY
DOCKET NO.: L-91-4718

SAT BELOW

The Hon. Phillip Lewis Paley, J.S.C.
The Hon. David J. Schroth, J.S.C.

REPLY BRIEF AND APPENDIX FOR PLAINTIFFS/APPELLANTS SAMUEL NARO AND LINDA NARO

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[Tables omitted in printing]

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STATEMENT OF FACTS

For purposes of this Reply Brief, the Statement of Facts submitted in support of the initial brief filed by Plaintiff/Appellants is adopted.

PROCEDURAL HISTORY

The Procedural History set forth by the Plaintiff/Appellants in the initial appellate brief is adopted herein. In addition, on November 21, 1995, Plaintiff/Appellants' filed a Brief and three part Appendix in support of this Appeal. On January 15, 1996, a Reply Brief and Appendix of the Defendant/Respondents, The Times, Peter Page and Richard Bilotti was received by Plaintiffs' counsel. On January 29, 1996 a Reply Brief and Appendix was received by Plaintiffs' counsel from Defendant/Respondents, The Trentonian, Journal Register Company, Mark A. Waligore, Paul Mickle and H.L. Schwartz, III. This Reply Brief is submitted on behalf of Plaintiff/Appellants in opposition to that Brief.

LEGAL ARGUMENT

POINT I

SUMMARY JUDGMENT IN FAVOR OF THE TRENTONIAN DEFENDANTS WAS IMPROPERLY GRANTED, AS EVIDENCED BY THE DEPOSITION OF CHIEF TAYLOR AND OTHER PROOFS.

In the case before this tribunal, the Defendants have squarely rested the burden of proof on the Plaintiffs, where that burden certainly lies. However, the fact as *proven* by the Plaintiffs, and set forth before the Trial Court in opposition to the summary judgment motions of these Defendants, was sufficient to defeat summary judgment at that time. The Defendant/Respondents, The Trentonian, Journal Register Company, Mark Waligore, Paul Mickle and H.L. Schwartz, III, can merely point to the Plaintiff, and a totally unrelated incident, in an attempt to smear the Plaintiff's reputation, somehow justifying their libelous attack on Plaintiff, Sam Naro. The facts, as set forth below, which should have defeated the summary judgment motion are quite simply stated as follows:

1. The profile of the murder suspect composite and van never fit Sam Naro, and the newspaper Defendants were well aware of this fact.

2. The newspaper Defendants had printed prior articles in their own newspapers about the Szeker murder in 1989, that clearly demonstrated that the Plaintiff, Sam Naro, did not fit the profile of the murder suspect by age, weight, and van, which should have raised reasonable doubt in their minds to print such a horrific story without further investigation.

3. The Defendant newspapers, The Times and The Trentonian, knowingly let the public believe that Sam Naro looked like the actual murder suspect composite, when, in fact, these papers knew quite clearly that they were referring to the so-called van driver "accomplice" composite, who

was wanted in 1989 for questioning only, according to their own newspaper stories.

4. It was the Defendant, The Trentonian, through its reporter, Defendant, Paul Mickle, according to Chief Taylor's deposition, (Pa443) that called the Hamilton Township Police and told them that Sam Naro was a murder suspect. The Hamilton Township Police indicated that this was the first that they had heard of such an accusation at that time. In short, The Trentonian used the Hamilton Township Police as their reliable source, when in fact, *it was The Trentonian that was the source to the police*. Then, The Trentonian knowingly distorted the police statements to mislead and confuse the public.

5. According to the certification of Kevin Pollard (Pa468), which was submitted by Defendants in support of summary judgment motions, there was nothing in the Hamilton Township Police file about Sam Naro being a suspect, or any other investigation of Sam Naro, therefore, the Hamilton Township Police could not have considered Sam Naro a suspect. Further, Chief Taylor, as set forth in the previous Brief in support of this Appeal, replied "no" to the newspapers when they asked him if Sam Naro was a suspect in the murder. These issues are precisely those issues which demanded that this matter proceed to a jury trial.

6. The deposition of Hamilton Township Police Chief Taylor was contrary to the certification (Pa72) which he provided for the newspaper Defendants.

7. The Plaintiff, Sam Naro, was not a public figure, but a private citizen, who received more front page news coverage with a false story than most public figures receive for factual stories. The fact that Sam Naro is a firefighter does not place him in the realm of a "public figure".

These facts, along with those facts set forth in support of this appeal, demonstrate clear proof that the newspaper Defendants acted with malice, and a complete disregard for the Plaintiff's rights in this matter. A trial on these issues would have further demonstrated the contradiction contained in the defense's version of what occurred, however, no trial ever occurred, since the newspaper Defendants were permitted to hide behind the cloak of Chief Taylor's false certification.

POINT II

THE TRIAL COURT IMPROPERLY QUASHED THE SUBPOENA SERVED UPON THE DEFENDANT, PAUL MICKLE.

Although the Defendant, Paul Mickle, properly points to N.J.S.A. 2A:84A-21.3, as the basis for asserting a newspaperman's privilege, the Plaintiff had demonstrated, under N.J.S.A. 2A:84A-21.3(b), the necessity for Mr. Mickle's testimony at the time of trial.

Although the Plaintiff had sought the information concerning this conversation between The Trentonian reporter, Paul Mickle, and Hamilton Township Chief of Police Taylor (a conversation which was not an *alleged* conversation but an *actual* conversation), from Chief Taylor, Chief Taylor's version of that conversation in his deposition contradicts the certification which he provided to the newspaper Defendants in support of their motion for summary judgment. Further, if Chief Taylor's deposition testimony is to be believed, Chief Taylor's version of what occurred in that phone conversation contradicts the reported story by Mr. Mickle in The Trentonian, in which Sam Naro was identified as a suspect.

At the time of the issuing of the subpoena, the newspaper Defendants, and the newspaper reporters, had been dismissed from the case. The only remaining Defendants were Hamilton Township Police Department and Chief Taylor. It

was necessary for the Plaintiffs, in order to prove their claims against Hamilton Township Police Department to seek, from reporter Mickle, the content of his conversation with Chief Taylor. Instead, due to Judge Schroth's decision to quash the subpoena, the Plaintiffs were left with no ability to contradict Chief Taylor's testimony by presenting the testimony of the individual with whom he had a conversation. At that point in the case there was absolutely no reason to protect the newspaperman's privilege, since Chief Taylor had already identified himself as the "source", and had indicated the nature of his conversation, and the content thereof. The necessity to protect the newspaperman's privilege was clearly outweighed by the Plaintiffs' rights in procuring the truth, and in being able to adequately prove a defamation claim. For that reason, the subpoena should not have been quashed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that Plaintiffs' appeal be granted.

Respectfully submitted,

BY: /s/ Robert A. Ballard, Jr.
ROBERT A. BALLARD, JR.

Dated: February 12, 1996

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NEW JERSEY SUPERIOR COURT
LAW DIVISION - MERCER COUNTY
DOCKET NO. L-91-4718

Civil Action

SAMUEL NARO and LINDA NARO,
husband and wife,

Plaintiffs,

v.

HAMILTON TOWNSHIP, et als.

Defendants.

CERTIFICATION OF KEVIN POLLARD

I, KEVIN POLLARD, of full age, hereby certify as follows:

1. I am employed by the Hamilton Township Division of Police holding the rank of Lieutenant, and I am in charge of the Detective Bureau.

2. I am fully empowered to make this Certification.

3. I have thoroughly reviewed the investigatory records in the possession of the Hamilton Township Division of Police concerning the Marjorie Szeker murder investigation, for the purposes of ascertaining whether any documents identified

Samuel Naro as a suspect in such investigation or otherwise referred in any way to Samuel Naro.

4. There are no documents in the possession of the Hamilton Township Division of Police as described in ¶3 preceding.

I certify the foregoing statements made by me are true. I am aware that if any of the foregoing is willfully false, I may be subject to punishment.

/s/ Kevin Pollard
Kevin Pollard

Dated: July 21, 1994

APPENDIX B

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Docket No. A-6485-94T2

SAMUEL NARO AND LINDA NARO, husband and wife,
Plaintiffs/Appellants,

vs.

HAMILTON TOWNSHIP; HAMILTON TOWNSHIP POLICE DEPARTMENT; DETECTIVE CAPTAIN THOMAS PIZZULLO; JOHN DOE I, JOHN DOE II, JOHN DOE III, JOHN DOE IV, JOHN DOE V, JOHN DOE VI, JOHN DOE VII, JOHN DOE VIII, JOHN DOE IX, JOHN DOE X, (fictitious names meant to represent other police officers involved in the investigation); THE TRENTON TIMES, THE NEWHOUSE PUBLISHING COMPANY, PETER PAGE, RICHARD BILOTTI, THE TRENTONIAN, JOURNAL REGISTER COMPANY, MARK A. WALIGORE, PAUL MICKLE, H.L. SCHWARTZ, III, RON ROE I, RON ROE II, RON ROE III, RON ROE IV, RON ROE V, RON ROE VI, RON ROE VII, RON ROE VII, RON ROE IX and RON ROE X,
Defendants/Respondents.

On Appeal From The Superior Court Of New Jersey
Mercer County, Law Division
Docket No. L-91-4718

Sat Below:

Honorable Phillip Lewis Paley, J.S.C.

BRIEF AND APPENDIX OF DEFENDANTS/RESPONDENTS *THE TIMES*, PETER PAGE AND RICHARD BILOTTI

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* * * * * * *

POINT V

PLAINTIFFS CANNOT ESTABLISH "ACTUAL MALICE" AS REQUIRED BY THE FIRST AMENDMENT AND THE LAW OF NEW JERSEY

Libel plaintiffs having the constitutional status of "public officials" or "public figures" cannot recover unless they establish by clear and convincing proof that the defendants published false and defamatory statements about them with "actual malice," i.e. with knowledge of falsity or with reckless disregard of the publication's truth or falsity. *New York Times v. Sullivan,* 376 U.S. 254, 280, 286 (1964) (applying "actual malice" test to speech about public officials); *see also Curtis Publishing Co. v. Butts,* 388 U.S. 130 (1967) (extending *Sullivan* test to speech concerning public figures).

In *Gertz v. Robert Welch, Inc.,* 418 U.S. 323 (1974), the Supreme Court identified two categories of public figures to whom the constitutional libel standard of actual malice pertain: so-called (1) "all-purpose" public figures and (2) "limited-purpose public figures." *Id.* at 344-45, 351. The former category describes persons that "achieve such perva-

sive fame or notoriety that he [or she or it] becomes a public figure for all purposes and in all contexts." *Id.* A limited-purpose public figure, on the other hand, is an individual that "voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." *Id.* In either instance, such persons "invite attention and comment," *id.* at 345, and "assume special prominence in the resolution of public questions." *Id.* at 351. That determination turns on two principal factors: (1) whether the alleged defamatory statements in issue relate to a "public controversy" or a "topic of legitimate public concern" and if so, (2) the "nature and extent" of plaintiff's participation in the controversy. *Vassallo v. Bell,* 221 N.J. Super. 347, 366 (App. Div. 1987); *see Sisler v. Gannett Co.,* 104 N.J. 256, 267 (1986).

The Times' statement that Naro was a "suspect" in the Szeker murder was surely a "topic of legitimate public concern." Moreover, Naro's participation in the armed robbery of Horchak, with the use of weapons and disguises, constitutes a voluntary participation in a public controversy. Courts have repeatedly found that suspects in criminal cases, particularly serious cases, are limited-purpose public figures. *See, e.g., Marcone v. Penthouse International Magazine for Men,* 754 F.2d 1072, 1085 (3d Cir.), *cert. denied,* 474 U.S. 864 (1985); *Ruebke v. Globe Communications Corp.,* 241 Kan. 595, 738 P.2d 1246 (1987). As in *Marcone* and *Ruebke,* Naro's robbery arrest was widely reported prior to his being implicated in the investigation of the Szeker murder. As such, he qualifies as a limited-purpose public figure.

Contrary to his assertion, Naro was not thrust into the Szeker limelight through no fault of his own. (Pb2). Naro placed himself into the Szeker limelight by committing a criminal act with a modus operandi apparently similar to that used to murder Marjorie Szeker. If Naro had not donned a

disguise and brutally beaten Andrew Horchak while attempting to rob him, Naro would not have attracted the suspicion of the Hamilton Township Police Department. Thus, he cannot be heard to complain that he involuntarily became a limited-purpose public figure.

Indeed, in opposing the newspaper defendants' motion for summary judgment in the court below, plaintiffs acknowledged that in order to survive the motion, they had to establish an issue of fact with respect to whether the newspaper defendants published the statement that plaintiff Samuel Naro was a "suspect" in the Szeker murder investigation with knowledge that he was not a suspect, or in reckless disregard as to whether or not he was a suspect, *i.e.* actual malice. (Pa104). They concede it again in their appeal brief. (Pb22). To determine whether a genuine issue of material fact exists as to actual malice, the Court must decide whether plaintiffs have produced "clear and convincing evidence" of actual malice by a sufficient "quantum and quality of proof." *Costello v. Ocean City Observer,* 136 N.J. at 614. Plaintiffs "must produce substantial evidence to survive a motion for summary judgment." *Id.* at 615.

In order to meet the "actual malice" test, "a public figure must prove with convincing clarity that the defamatory statements were published by the defendant with knowledge of their falsity or reckless disregard of whether they were true or false." *Lawrence v. Bauer Publishing & Printing Ltd.,* 89 N.J. 451, 466, *cert. denied,* 459 U.S. 999 (1982), *applying New York Times v. Sullivan,* 376 U.S. at 279-80. Libel defendants have not acted with "reckless disregard" under the *Sullivan* rule unless they have published defamatory statements with "a high degree of awareness of their probable falsity." *Garrison v. Louisiana,* 379 U.S. 64, 74 (1974), *quoted in Lawrence v. Bauer,* 89 N.J. at 466. As Justice Clifford paraphrased the "actual malice" standard in *Lawrence v. Bauer:* the defendant's "reckless-

ness in publishing material of obviously doubtful veracity must approach the level of publishing a 'knowing, calculated falsehood.' " *Lawrence v. Bauer,* 89 N.J. at 466; *see also Ryan v. Brooks,* 634 F.2d 726, 733 (4th Cir. 1980).

The New Jersey Supreme Court has ruled that only subjective evidence will satisfy plaintiffs' actual malice burden:

> The actual-malice standard is subjective. . . . Accordingly, the inquiry concerns [the defendant's] state of mind. To find actual malice, the factfinder must determine that the defendant in fact entertained serious doubts about the truth of the statement or that the defendant had a subjective awareness of the story's probable falsity.

Costello, 136 N.J. at 615; *accord Lawrence v. Bauer,* 89 N.J. at 467-68. Plaintiffs have presented no evidence that the newspaper defendants knew Naro was not a suspect or entertained serious doubts about whether he was a suspect.

In *Lawrence v. Bauer,* the plaintiffs challenged a newspaper article about alleged improprieties in obtaining signatures for a petition to oppose construction of a new firehouse in Rahway. *Id.* at 455. A source in the city administration had said that the city prosecutor was investigating the possibility of forgery in the petition. The defendants assumed that the plaintiffs, Lawrence and Simpson, would be investigated because they were responsible for witnessing some petition signatures. *Id.* at 455-56, 467. The article was entitled, in part, "City Attorney rules association petitions improper; forgery charges may loom for Simpson." *Id.* at 456. The article erroneously stated that the city prosecutor had been asked to take action against Lawrence and Simpson, and that a case would be based on forgery and false swearing of oaths and affidavits. *Id.* The New Jersey Supreme Court described the assumption that Lawrence was being investigated as a "misconception," and characterized the article as

a "careless and perhaps irresponsible account" of the information the newspaper had received from an informant in the city administration. *Id.* at 468. Nevertheless, the Court ruled that the evidence was insufficient to show that the defendants had known that the article was false or that they had actually doubted its accuracy. *Id.*

In the more recent case of *Costello v. Ocean City Observer,* the New Jersey Supreme Court affirmed the grant of summary judgment in favor of newspaper defendants charged with defamation. In *Costello,* a reporter had written an article based on an unsigned, unfiled draft of a complaint that was attached to an affidavit filed with the court. 136 N.J. at 618-19. In the unsigned, unfiled draft complaint, plaintiff Costello, a police officer, was charged with conducting an unlawful strip search of a handcuffed woman in custody. Notwithstanding evidence that other documents in the reporter's possession demonstrated the falsity of the information reported and that the reporter had failed to conduct a thorough investigation, the Supreme Court refused to overturn summary judgment entered in favor of the reporter and his newspaper. *Id.* As the Supreme Court stated: "Although Costello urges that a fuller investigation was required, failing to investigate more fully 'merely establishes possible negligence — it does not establish subjective knowledge of falsity or serious doubt about the truth of the story.'" *Id.* at 619 (quoting R. Smolla, Law of Defamation § 3.17, at 3-40.2). The Supreme Court further declared: "Costello fails to point to any proof suggesting that [the reporter] actually doubted that [the woman's] claim was true or doubted that the complaint was pending." *Id.* "A plaintiff must demonstrate more than an erroneous interpretation of the facts to demonstrate actual malice." *Id.* Notwithstanding its finding that there was "shoddy and careless reporting," the New Jersey Supreme Court decided that the plaintiffs had not produced "clear and convincing" evidence of

actual malice and remanded the case for entry of an order granting summary judgment for defendants. *Id.* at 619-20.

Plaintiffs' purported evidence of actual malice here is far weaker than that offered in *Lawrence* or *Costello.* In both *Lawrence* and *Costello,* it was undisputed that the statements made were false. Here, the statement that Naro was a suspect was true. In both *Lawrence* and *Costello,* there was contradictory evidence that the newspapers failed to consider. Here, there is significant evidence that Naro should have been a suspect given his use of disguises in the October 23, 1990 robbery, his ownership of a van that initially appeared to be similar to the van used in the Szeker murder, and Naro's admitted resemblance to the composite of the murder suspect.

The arguments raised by plaintiffs fail to address any material issues in this case. Plaintiffs argue that Naro was a taxpayer with a good reputation as a firefighter and family man and presumably, therefore, defendants should not have believed Naro could have been a suspect in a murder case. (Pb16). Defendants, however, were told he was a suspect and the reasons why: the circumstances of his arrest for armed robbery just one day earlier, his resemblance to the composite of the Szeker killer[4] and his ownership of a van.

Plaintiffs claim that Naro did not really resemble the Szeker killer and that the van used in the murder was different than Naro's van. (Pb10 to 11). The police and Naro's coworkers, however, believed there was a similarity between Naro and the composite and (at least initially) between the van used in the murder and Naro's van. In any event,

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[4] Plaintiffs claim that it was material that Naro did not resemble the killer's composite, but instead that of the getaway driver. (Pb3, 9 to 10). Under New Jersey law, a getaway driver—as an accomplice—is as culpable as the person who pulls the trigger. N.J.S.A. 2C:11-3(3).

newspapers are not required nor expected to report with scientific precision. The New Jersey Supreme Court has "recognize[d] that newspapers face competitive pressures to investigate stories quickly." *Costello,* 136 N.J. at 619-20.

Plaintiffs complain that it was not clear that Naro was just one of many suspects. Yet, *The Times'* article identifying Naro as a suspect quoted the police as stating that Naro "does fit the composite, but there are so many people that fit the composite that it doesn't mean a lot"; and that "the investigation of Naro was not a break in the case but just a lead that has to be checked." (DTa66).

None of these issues has any bearing on whether the newspaper defendants acted with actual malice in publishing the statement that Naro was a suspect in the Szeker murder. He was a suspect. Plaintiffs have presented no evidence to the contrary.

With the uncontroverted statements of Hamilton Township Police Chief Taylor and Detective Captain Pizzullo that Mr. Naro was a suspect in the Szeker murder, and that this official position of the police department was communicated to *The Times,* no reasonable juror could conclude that *The Times* published the statement that Naro was a suspect with knowledge that it was false or in reckless disregard as to whether or not it was false. (DTa127 to 129; DTa132). The facts which provided the basis for the statement — the robbery with use of disguises and deadly weapons, Naro's likeness to the composite sketch of the Szeker killer and his ownership of a van — simply provided the rationale for Hamilton Township's position that Naro was a suspect in the Szeker murder.

Naro's argument boils down to an assertion that although he was a suspect, he should not have been. Given the facts surrounding his earlier assault, there was considerable support for Naro's status as a suspect. However, whether or

not he should have been a suspect does not alter the undisputed fact that he was a suspect.

The record is bereft of clear and convincing (or any) evidence that the newspaper defendants believed that the allegedly defamatory statement reported in the article was false. Nor is there a shred of proof that the newspaper defendants subjectively "entertained serious doubts as to the truth" of the information published about Naro. On the contrary, the article was derived from information communicated by police officials, officials with whom *The Times'* reporter typically had day-to-day contact in the regular course of covering local activities in Hamilton Township.

Even if Naro is not considered a limited-purpose public figure, he still has the burden of proving that the newspaper defendants were at least negligent. *Gertz*, 418 U.S. at 347.[5] Here, *The Times*, in calling Naro a "suspect," relied on the police who were conducting the investigation. Only the police could have known that information. They have confirmed that the information published by *The Times* was accurate. Thus, Naro cannot establish that the newspaper defendants were negligent.

Accordingly, the newspaper defendants have no liability to plaintiffs and summary judgment for the newspaper defendants should be affirmed.

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[5] The United States Constitution prohibits a state from imposing defamation liability without a showing of fault under *Gertz*. 418 U.S. at 347.

APPENDIX C

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Docket No. A-6485-94T2
CIVIL ACTION

SAMUEL NARO and LINDA NARO, husband and wife,
Plaintiffs/Appellants,

vs.

HAMILTON TOWNSHIP, HAMILTON TOWNSHIP POLICE DEPARTMENT, DETECTIVE CAPTAIN THOMAS PIZZULLO, JOHN DOE I, JOHN DOE II, JOHN DOE III, JOHN DOE IV, JOHN DOE V, JOHN DOE VI, JOHN DOE VII, JOHN DOE VIII, JOHN DOE IX, JOHN DOE X, (fictitious names meant to represent other police officers involved in the investigation); THE TRENTON TIMES, THE NEWHOUSE PUBLISHING COMPANY, PETER PAGE, RICHARD BILOTTI, THE TRENTONIAN, JOURNAL REGISTER COMPANY, MARK A. WALIGORE, PAUL MICKLE, H.L. SCHWARTZ, III, RON ROE I, RON ROE II, RON ROE III, RON ROE IV, RON ROE V, RON ROE VI, RON ROE VII, RON ROE VII, RON ROE IX and RON ROE X

ON APPEAL FROM SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MERCER COUNTY
DOCKET NO.: L-91-4718

SAT BELOW

The Hon. Phillip Lewis Paley, J.S.C.
The Hon. David J. Schroth, J.S.C.

BRIEF FOR PLAINTIFFS/APPELLANTS

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STATEMENT OF FACTS

This is an action brought by the Plaintiffs, Samuel Naro and Linda Naro, against the Defendants, Hamilton Township, Hamilton Township Police Department, Detective Captain Thomas Pizzullo, John Does I - X meant to represent other police officers involved in the investigation, The Times, The Newhouse Publishing Company, Peter Page, Richard Bilotti, The Trentonian, Journal Register Company, Mark A. Waligore, Paul Mickle, H.L. Schwartz, III and Ron Roes I - X meant to represent other employees of the Defendant newspapers whose identities are presently unknown. The specific facts of this case are as follows:

The Plaintiff, Samuel Naro, was and is, a fire fighter in the City of Trenton. Following a two year stint in the Army in the years 1966 to 1968, Mr. Naro was hired as a fire fighter for the City of Trenton in 1970. He was an excellent employee with an excellent work record, prior to an unfortunate incident which occurred on October 23, 1990. At that time, Mr. Naro was arrested on an unrelated assault charge, and it was a highly publicized matter. His arrest created headlines in the daily newspapers of both The Trentonian (114a) and The Times (116a).

These unrelated charges ultimately resulted in a dismissal by virtue of a judgment of acquittal following a non jury trial on March 12, 1993. That dismissal, decided by The Honorable Maria Marinari Sypek, J.S.C., is annexed as (118a).

The background information concerning the arrest of Mr. Naro on assault charges, and his subsequent acquittal, are being brought to the Court's attention merely for background information in this matter. The Defendants, and all of them, have attempted to paint a picture of Mr. Naro as some sort of career criminal, by bringing up this arrest, and it is significant that he was acquitted of these charges. Mr. Naro, without his consent, was thrust onto the front pages of the Defendant newspapers as a result of his arrest, although he was subsequently acquitted. This attempt by the Defendant newspapers to create a public figure in Mr. Naro was the impetus for the alleged justification of Defendants to publish the libelous articles which form the basis of this Complaint.

What happened subsequently can best be described as a nightmare for Mr. Naro. Apparently, the Hamilton Township Police were investigating the highly publicized September, 1989 murder of a Marjorie Szeker, who was a teacher at the Hun School in Princeton Township, murdered on September 20, 1989 at the Cost Cutters store in Hamilton Township. The police had a composite sketch of the alleged murderer, and in fact had a suspect who was a prisoner at the Mercer County Detention Center named Louis Angel Rivera. In fact, The Trentonian ran an article on July 11, 1991, which is attached as (120a), indicating that Mr. Rivera had confessed to the Szeker murder, * * *